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No. 90-1371

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM E. STEPHENSON,

Petitioner,

v.

McLEAN CONTRACTING COMPANY, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the lower court correctly found that a construction worker assigned to work on and around a crane barge and whose duties involved welding and related activities was not a seaman as a matter of law.

AFFILIATED CORPORATIONS

The Respondent is affiliated with no other corporations, except wholly-owned subsidiaries.

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STATEMENT OF THE CASE

Respondent, McLean Contracting Company, Inc., is a contractor specializing in heavy construction. Respondent was awarded the contract to build the struts, piers and a portion of the roadway of a bridge spanning the Choptank River in Maryland, involving work on land and on the river itself. Petitioner, William E. Stephenson, was hired by Respondent as a licensed welder. When he was hired, Petitioner was informed that he would be assigned work on and off a crane barge as a welder, but that he would be expected to perform other tasks related to the bridge construction as needed.

Petitioner was assigned to the crane barge "Annapolis" which was engaged in constructing the bridge

the bulk of the remainder marking and moving bridge support pilings, pouring concrete, building false-work, placing reinforcing steel, assisting in pile driving and other construction activities. From time to time, Petitioner, who is not a licensed seaman, would assist in handling barge and push-boat lines bringing construction materials to the job site, and occasionally hooking up the anchor buoys to the crane boom or setting lights to mark the stationary barge at night, or to illuminate the site for night work.

When he was injured, Petitioner was rolling cut-off pieces of piling pipe across the deck of the Annapolis with the aid of a wrench. The jarring of two pieces of piling striking each other caused his shoulder to strain. At that time, the Annapolis was driving piles for the bridge.

The piling pipe which Petitioner was moving consisted of pieces cut off from pilings already driven to their proper grade, and were being saved to be welded by Petitioner or another welder as add-ons to piling that might be too short. Once the pilings were driven they would be filled with concrete and become a permanent strut supporting the bridge.

Although not critical, the date of injury was December 19, 1985, not December 23 as stated in the Petition, Page 3.

SUMMARY OF ARGUMENT

In McDermott International, Inc. v. Wilander, _____ U.S. _____ (No. 89-1474, decided February 19, 1991, 59 U.S.L.W. 4091), this Court excised from the Jones Act test for seaman status the portion which in some circuits, such as the Fourth Circuit, required the performance of navigational duties. The Court has more recently vacated the Fourth Circuit's most recent refinement of the test, Yoash v. McLean Contracting Company, 907 F.2d 1481 (4th Cir. 1990) _____ U.S. _____ (No. 90-602, decided February 26, 1991, 59 U.S.L.W. 3577), and remanded the case for further consideration in light of McDermott.

The McDermott decision begins the development of a new Jones Act status test which will separate genuine seamen from those not facing truly maritime perils, by

focussing on the fundamental policy behind inclusion in coverage.

The present case, involving facts and circumstances similar to those in Yoash, was decided by the Fourth Circuit prior to McDermott. In this case, the Fourth Circuit found Yoash to be controlling.

While it is difficult to distinguish the present case from Yoash, which the Court remanded, the Wilander opinion makes it clear that the decision in this case was correct, even if reached by means now discarded.

ARGUMENT

A. BACKGROUND OF THIS CASE

This case is one of a series of recent cases which have come before the Court on Petitions for Writ of Certiorari to the Fourth Circuit, all involving workers employed by McLean Contracting Company, and injured on the same bridge project. Stephenson v. McLean Contracting Co., 863 F.2d 340 (4th Cir. 1988), cert. denied 109 S.Ct. 2110 (1989), Yoash and Casson v. McLean Contracting Co., supra. This is the second time that Mr. Stephenson has been here on petition, but the first time since this Court's decision in McDermott International, Inc. v. Wilander, supra.

In the McLean cases, the Fourth Circuit recently had completed development of a portion of the overall Jones Act seaman status test, beginning with the decision

in Whittington v. Sewer Construction Co., 541 F.2d 427, 436 (4th Cir. 1976) which established a test of three prongs. As summarized in the Yoash case, supra, 907 F.2d. at 1484, the overall test is:

(1) the worker must be more or less permanently attached to a vessel or fleet;

(2) he must be one whose duties serve naturally and primarily as an aid to navigation in the broadest sense; and

(3) the vessel must be in navigation.

In the first of the McLean cases, Stephenson v. McLean Contracting Company, supra, the District Court had decided the case on McLean's motion for summary judgment, for purposes of which the court had assumed without deciding that Stephenson was permanently attached to a vessel in navigation, thereby satisfying the

first and third prong of the Whittington test. As to the second prong, however, the district judge found as a matter of law that Stephenson was a construction worker, that any "navigational" tasks he may have performed were only incidental to his main job, so that his duties did not "serve naturally and primarily as an aid to navigation in the broadest sense". Stephenson v. McLean Contracting Co., supra, 863 F.2d at 341.

This court denied Stephenson's petition for certiorari and the next two cases, consolidated for briefing and argument, came to the Fourth Circuit on appeal from a granting of McLean's motions for summary judgment in each case. Yoash v. McLean Contracting Company, supra. Yoash and Casson worked on and off a crane barge, as had Stephenson, and both were assigned to aspects of pile driving work. As with

Stephenson, the only issue before the Circuit Court on appeal was whether Yoash and Casson met the second prong of the Whittington test as to their duties. In refining its earlier formulation, the court stated:

> The second prong of the test for determining seaman status under the Jones Act, after Whittington and Stephenson, is whether a worker's duties, when considered in the aggregate, serve naturally and primarily as an aid to navigation. In making the "aid to navigation" determination, a consideration of whether the duties primarily contribute, either directly or indirectly, to the transportation function of the vessel is appropriate.

Yoash, supra, 907 F.2d at 1485.

This Court granted the Petition for Certiorari, vacated the judgment of the Fourth Circuit, and remanded the case for further consideration in light of McDermott International, Inc. v. Wilander, supra.

In the present case, decided prior to the decision

in McDermott, the Fourth Circuit affirmed the district court's grant of McLean motion for summary judgment, holding that its earlier decisions in the Stephenson and Yoash cases were controlling. Petition A-7.

As in the earlier cases, the only issue before the Court of Appeals in this case was Stephenson's status under the second prong of the Whittington test. Since there had been a specific finding that the circumstances surrounding Stephenson's new injury were essentially the same as in his earlier case, Stephenson was found not to be a Jones Act seaman as a matter of law because his duties did not serve naturally and primarily as an aid to navigation nor did they otherwise contribute to the transportation function of the barge on which he was working. Petition A-5, 6.

B. THE DEMISE OF THE NAVIGATIONAL TEST

The last paragraph of this Court's opinion in McDermott International, Inc. v. Wilander, supra, 59 U.S.L.W. at 4097, is important in this case:

> The question presented here is narrow. We are not asked to determine if the jury could reasonably have found that Wilander had a sufficient connection to the Gates Tide to be a "seaman" under the Jones Act. We are not even asked whether the jury reasonably found that Wilander advanced the function or mission of the Gates Tide. We are asked only if Wilander should be precluded from seaman status because he did not perform transportation-related functions on board the Gates Tide. Our answer is no.

Because of this limiting language, it does not appear profitable to inquire too deeply into the facts of that case for purposes of comparing them to those of the present case. A brief glimpse, however, may add perspective.

Wilander was assigned to a vessel as a paint foreman, but was injured while inspecting pipes on an oil drilling platform. Petitioner's employer, McDermott, moved for summary judgment, the trial court denied the motion, and on interrogatory the jury found that Wilander was more or less permanently attached to a vessel and his duties contributed to its function or the accomplishment of its mission. The Fifth Circuit found that the jury's factual determinations satisfied its longstanding test for Jones Act seaman status.

McDermott, in context, seems to raise two issues: first is what is the proper test of Jones Act seaman status, and second, is who is to decide questions arising under the test.

As to who is to decide status issues, Justice O'Connor in McDermott gives some needed clarity to the

respective roles of judge and jury:

> ... we note that the question of who is a "member of crew", and therefore who is a "seaman", is better characterized as a mixed question of law and fact. When the underlying facts are established, and the rule of law is undisputed, the issue is whether the facts meet the statutory standard.
>
> It is for the court to define the statutory standard. ... The jury finds the facts and, in these cases, applies the legal standard, but the court must not abdicate its duty to determine if there is a reasonable basis to support the jury's conclusion.

59 U.S.L.W. at 4097 - citations omitted.

Although the Court emphasized that it rendered no opinion on the propriety of the submission of the issues to the jury in McDermott, the Court's language supports a central role for the trial court in the fact finding process. We submit that the Fourth Circuit's own standard respecting the proper roles of judge and jury is fully in accordance with the Court's opinion, and was

correctly applied in this case.

On the other issue, however, there can be no doubt that the Court has adversely impacted the development of the navigational/transportation function test developed by the Fourth Circuit.

At first blush, it might be thought that the Court's opinion pushes all of admiralty law in the Jones Act area back to the slough of despond in which all maritime contractors and employers labored prior to the attempts in the Seventh, Fourth and other circuits to differentiate those workers who legitimately faced the perils of the sea from those whose connection with maritime matters arose only as an incidental part of their overall employment. In fact, there was even some defection from the relatively undifferentiated and liberal Offshore Company v. Robinson, 266 F.2d 769 (5th Cir. 1959) test

among the judges of the Fifth Circuit. See Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067, 1076 (5th Cir. 1986 - concurring opinion).

For an employer to provide at great expense, with premiums annually adjusted retroactively in order to reflect the prior year's incurred claims and expenses, a full panoply of statutory and voluntary employee benefits to pay for injuries sustained on the job, only to have employees whose job duties have some maritime flavor, however incidental or remote, sue under the Jones Act after recovering all other benefits, including compensation under state or federal programs, has proved to be nothing short of a national disgrace. It vastly increases costs to the employer, it creates needless and troublesome uncertainties in bidding and costing jobs, it prohibits the financial closing of job files until

long after the work is completed, and the cost of all of this is, depending on the vagaries of prevailing competitive circumstances, either absorbed by the employer, or passed on to the public through increased costs of materials or service. Either way, the burden on the economy is enormous and wasteful.

The system prior to the attempted clarification by the Fourth Circuit and others, was also contemptuous of Congressional purpose. It has been a matter of judicial articulation for many years that worker compensation schemes, such as the Longshore and Harbor Worker's Compensation Act, 22 USC § 901-950 (LHWCA), are a legislative attempt to balance the interests of the injured employee and those of his employer. The employee ordinarily is entitled to receive an immediate compensatory award regardless of his own fault or that of

his fellow employees, and unencumbered by all other traditional defenses of employers, in exchange for which the employer receives a degree of certainty, predictability, and controlled, reasonable expense, all of which are the life blood of the bidding, costing and forward budgeting processes. See, eg Bradford Electric Co. v. Clapper, 286 U.S. 145, 159 (1932); Carey v. Crane Service, Inc., 457 F.2d 1102, 1105 (D.C. Cir. 1983); Smither and Company v. Coles, 242 F.2d 220, 222 (D.C. Cir. 1957); Ramirez v. Toko Kaiun K.K., 385 F.Supp. 644, 649-50 (N.D. Cal. 1974). Therefore, these compensation schemes have been declared in the enabling legislation to be the employees' exclusive remedy, and special adjudicatory bodies have been established outside the court system to implement them.

In the confused arena which the Fourth, Seventh

and other circuits sought to clarify, fiscal uncertainty reigned to the detriment of many things: the financial health of employers, attempts of public and other purchasers to control costs, the ability of the employer to reduce its exposure through safety programs, and, just as important, the integrity of the legislative vision and of the court system itself.

A reading of McDermott makes it clear that the Court is aware of these matters, and this Respondent does not believe that it is the intent of the McDermott decision to signal a return to confusion, but instead, to begin a healthy process of clarification so that the balance of legitimate competing interests may be restored on a nationwide basis.

With this thought in mind, this Respondent reads the discarding of the navigation test as the beginning of

the development of a new test of differentiation between those employees legitimately covered by the Jones Act, and those who seek its aid solely in order to augment statutory benefits already received by taking another, free and safe, bite at the compensable injury apple.

The Court appears to have been concerned that the navigational test would exclude legitimate seamen, as the extensive historical analysis in the McDermott opinion suggests. See, 59 U.S.L.W. at 4094. But in all of the cases cited by the Court, there seems to be a common thread: exposure of the employee involved to the perils peculiar to the sea. In all of these cases, it is clear that the worker involved had no escape in that he or she was trapped on the vessel, as fully subject to the discipline of the master as though he or she had signed aboard for navigational duties. This interpretation seems consistent

with the following:

> We believe the better rule is to define "master or member of a crew" under the LHWCA, and therefore "seaman" under the Jones Act, solely in terms of the employee's connection to a vessel in navigation. This rule best explains our case law, and is consistent with the pre-Jones Act interpretation of "seaman" and Congress' land-based/sea-based distinction. All who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed.

59 U.S.L.W. 4096 - citation omitted.

The Court references at this point Robertson, "A New Approach to Determining Seaman Status", 64 Texas Law Review 79 (1985), where, early in that article, Professor Robertson says:

> The governmental policy at stake in the seaman status jurisprudence is assuring the protection of the benevolent seamen's remedies to those workers who confront the characteristic seamen's dangers, while confining other maritime and amphibious workers to alternative remedial systems. However, the body of seaman status doctrine developed by the courts does not focus directly on the dangers experienced by

> the worker, but rather on the nature and extent of his work connection with a vessel or group of vessels. The underlying policy is seldom discussed, and occasionally seems to have been forgotten.

64 Texas Law Rev. at 84.

Therefore, McDermott refocuses the inquiry so as to determine legitimate claimants, and at the same time to answer the legitimate concern that decisions on Jones Act coverage were becoming so confusing and all-inclusive that any attempt to distinguish between coverage under it and coverage under the LHWCA was becoming meaningless. See, eg., Johnson v. John F. Beasley Construction Co., 742 F.2d 1054, 1062 (7th Cir. 1984), Barrett v. Chevron U.S.A., Inc., supra.

C. McDERMOTT APPLIED TO THIS CASE

It is noteworthy that this Court's vacating, but not reversing, the Fourth Circuit's judgment in the Yoash case is entirely consistent with the McDermott holding, because there is a great deal that McDermott does not decide as the Court so clearly says, and it is these very things that are crucial to the McLean line of cases.

This Court is obviously aware that the factual development of the McLean cases was designed to be responsive to the test of seaman status as it was being refined and developed by the Fourth Circuit, and that each of these cases was decided by an assumption for purposes of decision only that two of the prongs of the Fourth Circuit test were met, so that the court focussed solely on the second prong involving the aid to navigation

test, as a portion of which the Fourth Circuit has said "a consideration of whether the duties primarily contribute, either directly or indirectly, to the transportation function of the vessel is appropriate." 907 F.2d at 1486 (emphasis added).

Even if one excises from its consideration of this case the navigation/transportation function test, McLean can argue that the outcome in the district court and in the Fourth Circuit would have been the same. In support, it is important to note that this Court stated in McDermott that:

> The key to seaman status is employment related connection to a vessel in navigation. We are not called upon here to define this connection in all details, but we hold that a necessary element of the connection is that a seaman perform the work of a vessel. ... In this regard, we believe the requirement that an employee's duties must "contribut[e] to the function of the vessel or to the accomplishment of its mission" captures well an important requirement of seaman status.

> It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work.

59 U.S.L.W. 4096 - citations omitted.

In each of the McLean cases and in this case, the plaintiff was a construction worker building a bridge. To the extent that any of their activities had to do with attention to the floating work platforms, it was solely incidental to their construction job. In Stephenson's case, he was a welder. He could perform that task as well on land as on water, or inside or outside a cofferdam. The fact that the crane assisting the pile driving is floating has no more significance to the performance of his job than the presence of a wheeled crane would have on land. Stephenson's rolling piling pipe and suffering injury when two pieces collide has no maritime nexus whatsoever. Nowhere in this case is there any justification for finding

the existence of "those particular perils" associated with maritime work which justify seaman status.

Is the crane barge in this case a vessel? With navigational lights in place and under tow in shipping channels with a true deck crew on board, and subject to all of the maritime rules of the road and Coast Guard regulations, the answer would have to be yes. But anchored as it was, with its spuds firmly imbedded in the river bottom, immobile as man can make it, engaged in driving piles, it is not a vessel at all, much less one in navigation, but merely a stationary platform for performing work. See, eg., Hurst v. Pilings & Structures, Inc., 896 F.2d 504 (11th Cir. 1990).

Professor Robertson suggests in his article that his approach of focussing on whether work duties actually performed expose the worker to the dangers of the sea

or moving vessels would take some inshore workers out of seaman status:

> Longshoremen and other inshore maritime and amphibious workers - workers who do not go to sea -do not confront the perils of the sea, and most of them are not significantly affected by dangers attending the movement of vessels.

64 Texas L. Rev. at 121-2.

Since there were no circumstances surrounding Mr. Stephenson's employment with McLean which would justify a finding that he was exposed to peculiarly maritime hazards, as opposed to the usual dangers of heavy construction work, the outcome of the present case was correct, particularly in light of McDermott.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

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